

1981 S.C. Op. Atty. Gen. 42 (S.C.A.G.), 1981 S.C. Op. Atty. Gen. No. 81-26, 1981 WL 96552

Office of the Attorney General

State of South Carolina

Opinion No. 81-26

March 24, 1981

***1 Subject: State Agencies, Commission for the Blind; Education, Students; Education, State Department of Education**

The Education for the Handicapped Act ([30 USC § 1401](#), *et seq.*) does not require the Commission for the Blind to provide mobility instructors and itinerant teachers for children in the public schools.

TO: Maxine R. Bowles
Commissioner
South Carolina Commission for the Blind

QUESTION:

Does the Education for the Handicapped Act require the Commission for the Blind to provide Itinerant Teachers and Mobility Instructors for children in the public schools?

The Education for the Handicapped Act ([EHA–20 USC § 1401](#), *et seq.*) provides assistance to states for the education of handicapped children if the states make certain assurances that the children will receive a ‘free appropriate public education (FAPE). The responsibility of the Commission for the Blind (the Commission) under this law is largely dependent upon whether South Carolina law requires the Commission to provide these personnel for the visually handicapped.

The responsibility for ensuring that EHA requirements are carried out is placed on the state educational agenc[ies] (SEA) which, in South Carolina, is the State Department of Education (the Department). [§§ 1401\(7\) and 1412\(6\)](#) and [34 CFR 300.600; *Kruelle v. Biggs*, 489 F. Supp. 169 \(DC Del. 1980\)](#). SEA's are required to develop plans for executing the states' duty to provide FAPE. [§ 1413](#). They must also approve all applications for funds from ‘local educational agenc[ies]’ (LEA) which, in South Carolina, are local school districts and from intermediate educational units (IEU) which, are other agencies under the authority of the Department. [§§ 1401\(8\), 1401\(22\), and 1414](#). The LEA's and IEU's are responsible for ensuring that children within their jurisdiction receive FAPE. [§ 1414](#) and [34 CFR 300.200](#), *et seq.*

Although SEA's and LEA's are responsible for assuring that all entitled children receive a free appropriate education, other state agencies are not relieved of their previous responsibilities in providing for the education of the handicapped. The EHA regulations expressly apply to all state agencies involved in the education of handicapped children. [34 CFR 300.2](#). The ‘Comment’ to [34 CFR 300.2](#) explains that the regulations ‘. . . are binding on each public agency that has direct or delegated authority to provide special education and related services in a state that receives funds under Part B [of the EHA], regardless of whether that agency is receiving funds under Part B [emphasis added]’. In particular, the annual program plan must show the applicability to all public agencies of the policy of that state that insures that each child has the right to a free appropriate public education. [34 CFR 300.121\(c\)\(i\)](#).

The question arises as to what specific responsibilities are imposed by the EHA on public agencies other than the SEA's and LEA's. Obviously, to interpret the law to require that, when an LEA and one or more public agencies have contact with a handicapped child, each body is to provide the same care would be absurd. Instead, the EHA seems to give the states the

discretion to decide how the responsibility for the education of the handicapped should be divided among those agencies having 'direct or delegated authority' in that area. (34 CFR 300.2). Regulation 34 CFR 300.301(a) says that '. . . [e]ach state may use whatever state, local, federal and private sources of support are available in the state to meet the requirements [of the EHA regulations]'. See also § 1412(6) and 34 CFR 300.600(2). Consistently with this regulation, a Massachusetts hearing officer stated that '. . . the concept of shared responsibility, shared funding, and shared service delivery is a theme that permeates all legislation dealing with the rights of handicapped persons . . .' *Samuel C. v. The Worcester Public Schools*, 3 EHLR 502:160 (Bureau of Special Education Appeals, Massachusetts, 1980). In a consent decree involving handicapped children and certain state education officials and local school districts, the Mississippi State Department of Education was directed to enter interagency agreements with each Mississippi agency involved in the education or care of handicapped children including such agencies as Mental Health and Youth Services. *Mattie T. v. Holladay*, 3 EHLR 551:109 (ND Miss., 1979). These agreements were to include a statement that the agencies would cooperate with local school districts when called upon by those districts to provide services necessary for implementation of a child's evaluation or individualized education program (IEP). That fiscal responsibility can be shared is made clear by 34 CFR 300.301(a) which states that a state could use joint agreements between agencies for sharing the cost of services. See also *Samuel C.*, *supra*. But see *Kruelle*, *supra*.¹

*2 The above regulations and other authority indicate that the duties under EHA of a state agency other than the SEA or an LEA are to be determined by their existing authority under state law and any existing interagency agreement or other provisions for the sharing of responsibilities. Thus, whether the Commission for the Blind must provide services to children coming within the scope of EHA is dependent upon its duties under South Carolina law. This office is not aware of any formal agreement by which the Commission is required to provide services.

The Commission for the Blind has a number of statutory powers and duties with respect to the blind but the only one specifically applicable to children is § 43-25-60 which states that the Commission '. . . may employ qualified itinerant teachers to assist teachers in public or private schools who are responsible for the teaching of visually handicapped students [emphasis added]'. But see § 43-25-30(8).² These itinerant teachers are to assist the public or private school teacher by providing methods and materials for teaching these students. This office has been informed by Commission employees that the assistance provided by what it calls 'itinerant consultants' includes consulting work for teachers if requested and habilitation services for children up to age 14. The habilitation services are provided in summer programs and may include such instruction as dressing and cooking. More extensive services are provided for pre-school children not served by the school districts. All of these services would appear to come within the scope of those included in a free appropriate public education under the EHA. This education includes 'special education' which is 'specially designated instruction . . . to meet the unique needs of a handicapped child . . .' (§ 1401(16)) and related services' which are, in part, supportive services which may be required to assist a handicapped child to benefit from special education (§ 1401(17)). § 1401(18).

Although the work performed by the itinerant teacher is of the same nature as that included under FAPE, the provision of it by the Commission for the Blind does not appear to be required by state law. Any work performed by these teachers beyond that to which § 43-25-60 refers is clearly not required and the statute, itself, does not appear to be mandatory.³ This interpretation is supported by the legislature's having made express provision for teachers of the visually handicapped through the State Department of Education in both prior (§ 59-21-510, *et seq.*) and subsequent legislation (§ 59-33-10, *et seq.*). An opinion of Attorney General McLeod dated January 30, 1971 concluded that the authority of the Commission with respect to blind children is only adjunct to and supportive of the prime responsibility vested in the State Department of Education.

Because South Carolina law does not require the Commission for the Blind to provide the services of itinerant teachers, the EHA would not appear to impose any greater duties on the Commission. That Act is concerned only that some agency or subdivision in the State of South Carolina is providing a free appropriate public education to children in need; however, when the Commission does provide services coming within the scope of those included in FAPE, it should make sure that it is doing so in accordance with EHA directives for them.

*3 These same conclusions would apply with respect to 'mobility instructors' which the Commission is clearly not required to provide blind children. The [Title 20](#) grant, which provided the only authority for that service, has since been terminated.

CONCLUSION: The opinion of this office is that the Commission for the Blind is not required to provide itinerant teachers or mobility instructors in the public schools under state law or the Education for the Handicapped Act. No opinion is expressed herein as to the applicability of this law to any other service of the Commission for the Blind or of any other state agency.

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Footnotes

- 1 This case's statement that the SEA is responsible for 'arranging full payment [emphasis added]' (3EHLR 552:144) seems to mean only that the SEA is responsible for seeing that the education to which handicapped children are entitled under the EHA is fully funded by the SEA, the LEA or another agency.
- 2 This opinion is limited only to the applicability of the EHA to mobility instructors and itinerant teachers. This office has been informed by Commission employees that the Commission provides vocational rehabilitation services to all eligible persons.
- 3 § 43-25-60 merely states that the Commission 'may' employ the teachers. '. . . [o]rdinarily the use of [this] term carries no mandate . . . [O]nly where the context indicates or where the object to be attained compels such a construction [shall] the imperative . . . be deemed the legislative intent.' *Sutherland Statutory Construction*, Vol. 2A, § 57.03, p. 416. The context here supports a merely permissive construction of 'may'. In subsequent sentences of § 43-25-60, the legislature uses the word 'shall' with reference to the duties of the teachers, the Department of Education, and school principals. The legislature's use of both the terms 'may' and 'shall' in the same statute permits the inference that that body '. . . realized the difference in meaning . . .' and concluded that these words should carry their ordinary meanings. *Id.* at § 57. The legislature could have intended that reporting be mandatory, but that the employing of itinerant teachers and their assignment be discretionary in the context of the availability of fiscal and other resources to support them.

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